BANK OF COMMERCE (M) BHD

v.

CHIN YET SIN

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2(S3)-24-830-1998]
23 AUGUST 2000

CIVIL PROCEDURE: *Service - Foreign defendant - Service at local residence - Whether service rendered invalid - Whether defendant residing locally*

The plaintiff applied, by way of originating summons ('OS'), for foreclosure proceedings against the defendant. Unable to effect personal service, the plaintiff obtained an order for service by way of substituted service. The defendant applied to set aside the said order and that was granted by the senior assistant registrar ('SAR'). The plaintiff now appealed.

The defendant argued, *inter alia*, that: (i) as she was a Singapore citizen, service out of jurisdiction was not complied with under O. 6 r. 6 Rules of the High Court 1980 ('RHC'); and (ii) the plaintiff's process server was informed by the occupant at the Kuala Lumpur address that the defendant was not at the said premises.

Held:

[1] By her conduct and letters the defendant had clearly indicated to the plaintiff that she was residing at the Kuala Lumpur address. The plaintiff had deliberately not proceeded pursuant to O. 6 r. 6 RHC because the plaintiff was satisfied that the defendant was residing in Kuala Lumpur. The occupant of the Kuala Lumpur address merely said that the defendant was not at the said premises as she was in Australia. The said occupant did not aver that the defendant was not residing at the Kuala Lumpur address. Thus, this court was satisfied that the defendant had deliberately been avoiding service.

[Appeal allowed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 6

For the appellant/plaintiff - SA Ponmugam; M/s Ponmugam & Co
For the respondent/defendant - CH Foong; M/s LC Chong & Co

Reported by Raja Vishnu

JUDGMENT

RK Nathan J:

Facts

The plaintiff applied, by way of originating summons (the OS), for foreclosure proceedings against the defendant. Being unable to effect personal service, the plaintiff applied for and obtained on 11 December 1998 an order for service by way of substituted service. Having entered conditional appearance, the defendant applied by way of encl. 17, to set aside the said order. Having heard the arguments the learned Senior Assistant Registrar (SAR) set aside the order granting the plaintiff leave to effect service by way of substituted service, on 28 September 1999. This is the plaintiff's appeal against that order.

Findings Of The Court

Since there is no complaint with regard to the substituted service proper, I shall deal straightaway with the defendant's complaint which is that since she is a Singapore citizen whose Singapore address has been stated in the annexure to the charge, the plaintiff ought to have issued the OS in compliance with O. 6 r. 6 of the Rules of the High Court 1980 (the RHC) which requires the plaintiff to obtain leave of the court before issue, if the said writ notice is to be served out of jurisdiction. The defendant argued that in the circumstances the OS herein is invalid and should be set aside. The defendant further argued that since service was effected at an address in Kuala Lumpur, namely, at No. 5-40, 5th Floor, Wisma Central, Jalan Ampang, Kuala Lumpur (the Kuala Lumpur address), this was contrary to the specific provisions of the charge documents which contained the Singapore address. The defendant also argued that since the plaintiff's process server was informed by the occupant of the Kuala Lumpur address when the former went to the said Kuala Lumpur address to effect service, that the defendant was not at the said premises, but was at that time in Australia, and since the said occupant had also affirmed an affidavit to that effect, the plaintiff could not claim effective service upon the defendant.

On the other hand, the plaintiff has exhibited two letters dated 24 September 1996 and 30 September 1996 from the defendant and addressed to the plaintiff, wherein the defendant had stated her address, as care of the Kuala Lumpur address. Although in the letter dated 24 September 1996 the defendant had stated in the first paragraph that she is "now resident outside jurisdiction" I am convinced that the defendant was deliberately attempting to evade service. After all if the defendant's address was as stated in the charge documents, namely, the Singapore address, then I find it rather puzzling why the defendant did not use that same address as her correspondence address in the said two letters. Further, by merely stating that she was outside the jurisdiction the defendant was clearly aware of the rules requiring service outside jurisdiction. After all if the defendant was indeed residing in Singapore, it would have been perfectly normal for her to have stated her Singapore address in the said two letters to lend authenticity to her claim of residing outside the jurisdiction of this court.

The defendant in fact was the guarantor of the loan which was given to one Hexxon Grapfic Sdn Bhd (the company). The plaintiff's solicitors sent a notice of demand to the said company. At the same time a copy of the said notice of demand was also sent to the defendant's Singapore address as stated in the annexure to the charge. The said letter was returned with a remark written on the envelope "staying in Malaysia". A photostat copy of the envelope was exhibited to the plaintiff's affidavit in support of the application. By her conduct and letters the defendant had clearly indicated to the plaintiff that she was residing in Kuala Lumpur at the address given.

To my mind, the plaintiff had deliberately not proceeded pursuant to O. 6 r. 6 of the RHC because the plaintiff was satisfied that the defendant was residing in Kuala Lumpur. The occupant of the Kuala Lumpur address merely said that the defendant was not at the said premises as she was in Australia. The said occupant did not aver that the defendant was not residing at the Kuala Lumpur address. He merely said "defendan tidak berada di premis tersebut dan sebaliknya berada di luar bidang kuasa iaitu di Australia". Since the defendant herself maintains that she is residing in Singapore, there is no explanation as to whether she was on holiday in Australia. In any case, she could not be residing in Australia.

I am satisfied that the defendant had deliberately been avoiding service of process. I therefore allowed the appeal and set aside the judgment of the learned SAR given on 28 September 1999 with costs to the appellant.